BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIMBERLY OWEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,050,199
MARKIN GROUP	)	
Respondent	)	
AND	)	
	)	
STATE FARM FIRE & CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 21, 2011, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded additional medical treatment for the injury suffered on February 15, 2007, after the ALJ found that claimant's contract for hire with respondent was formed while claimant was in her home in Kansas City, Kansas, and the Stipulation For Compromise Settlement, filed in Missouri with claimant's settlement of that matter, constituted written claim for the purpose of claimant claiming additional medical benefits in Kansas.

Claimant appeared by her attorney, Kristi L. Pittman of Liberty, Missouri. Respondent and its insurance carrier appeared by their attorney, Denise E. Tomasic of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Kimberly Owen taken August 18, 2010, with attachments; the deposition of Kevin Martinez taken April 18, 2011, with attachments; the transcript of Preliminary Hearing held April 20, 2011, with attachments; and the documents filed of record in this matter.

ISSUES

1. Does the Kansas Division of Workers Compensation (Kansas Division) have jurisdiction over this matter? Respondent contends that the contract for hire in this

matter occurred after claimant came to respondent's office in Missouri. Therefore, the appropriate jurisdiction would be in Missouri. Claimant contends the final act necessary to form the contract occurred while claimant was in her home in Kansas, when her brother, a co-owner of respondent, offered her a job over the telephone, and claimant accepted the offer.

2. Did claimant submit timely written claim pursuant to K.S.A. 44-520a of the Kansas Workers Compensation Act (Kansas Act)? Respondent contends that claimant did not submit written claim until at least March 2010. Claimant contends that the ALJ was correct when he ruled that the Stipulation For Compromise Settlement, filed in Missouri with the settlement of claimant's injury claim, constituted written claim for the purpose of claiming a work-related injury under the Kansas Act.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant worked as a customer service representative for respondent. This was claimant's second period of employment. Claimant originally worked for respondent from 1997 to 1999. She then quit to stay home with her family. In 2003, claimant was contacted by James Kincaid, one of the owners of respondent and claimant's brother, about returning to work for respondent. Claimant testified that during this phone call, claimant was offered the job and she accepted the offer. At the time of the call, claimant was at her home in Kansas City, Kansas. Mr. Kincaid would have been at respondent's office in Missouri.

Shortly after the telephone call, claimant met with Mr. Kincaid and Kevin Martinez, respondent's other owner, at respondent's office. Claimant testified that the purpose of this meeting, which then occurred over the lunch hour down the street, was to finalize items such as her hours, pay and job duties. There was no job offer at the meeting as claimant had already been hired. Claimant again went to work for respondent, performing the majority of her duties in respondent's Missouri office. However, she did occasionally work from home.

On February 15, 2007, claimant was injured when she suffered a slip and fall while at respondent's Missouri office. An employer's report of the accident was prepared and filed in Missouri on March 29, 2007. No report was filed with the Kansas Division. Compensation was paid and claimant was provided medical treatment through the Missouri Division of Workers Compensation (Missouri Division). The last medical bill was paid on this claim on April 23, 2008, with the matter being settled on April 24, 2008, with all issues on the Missouri claim being resolved with the settlement.

On March 31, 2010, claimant had prepared a request for medical treatment to be provided through the Kansas Division, pursuant to K.S.A. 44-534(a) [*sic*].[1] The letter was received by Mr. Martinez in early April 2010. This was the first notification by Mr. Martinez that claimant was pursuing a workers compensation claim in Kansas. When Mr. Martinez was asked about both the telephone call to claimant in 2003 and the meeting between Mr. Kincaid, claimant and himself, he had little or no recollection. He did not know what Mr. Kincaid may have told claimant during the telephone call. However, he did testify that Mr. Kincaid would not have been authorized to hire anyone without Mr. Martinez' permission. That is the only testimony provided to contradict claimant's allegation that she was hired over the telephone while in Kansas. Mr. Martinez was not able to testify to the specifics of the conversation between the three when they met after the telephone call. Other than general policies, he could provide no testimony to contradict claimant's description of both the telephone call and the later meeting. Sadly, Mr. Kincaid, claimant's brother and the co-owner of respondent, died on December 16, 2009.

The ALJ found that claimant's contract of employment had been finalized during the telephone conversation between her and Mr. Kincaid, with the last act being claimant's acceptance of the offered job. The ALJ also found that claimant satisfied the requirements of K.S.A. 44-520a with the signing and filing of the Stipulation For Compromise Settlement, entered at the time of her settlement with respondent of the Missouri workers compensation claim. During her deposition taken on August 18, 2010, claimant testified as follows:

> Q. (By Ms. Tomasic) So when you settled your claim in Missouri, did you have the intention at that time to later file a claim in Kansas?
>
> A. I was under the impression – I had been told by Dr. Amundson that I would continue to get better and within two years be back to normal status. And, no, with that understanding, I was not planning a lawsuit."[2]

Claimant also contends that medical reports from board certified orthopedic surgeon Glenn M. Amundson, M.D., constitute written claim for claimant's Kansas workers compensation claim. However, the medical report from April 4, 2007, contains no indication that it was ever provided to or presented on behalf of claimant to respondent. The letter merely advises as to the ongoing medical treatment for claimant. There is no indication that claimant's wishes were being presented to respondent. The medical report of August 8, 2008, is an office note which does not indicate when or if it may have been presented to anyone with respondent.

---

[1] See letter from Kristi L. Pittman to State Farm Fire & Casualty Company dated March 31, 2010.

[2] Owen Depo. at 32.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]
>
> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[6]

The contract is "made" when and where the last necessary act for its function is done.[7] When that last necessary act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.[8]

Here, claimant contends that she was offered a job while she was at her home in Kansas City, Kansas, talking to James Kincaid, her brother and the co-owner of respondent. Claimant accepted the job offer during that conversation. Respondent contends that the actual offer did not occur until claimant met with both Mr. Kincaid and his partner, Kevin Martinez, in Missouri. However, Mr. Kincaid died in 2009 and was never available to testify in this matter. Additionally, when Mr. Martinez testified, he had little

---

[3] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2006 Supp. 44-501(a).

[6] K.S.A. 2006 Supp. 44-501(g).

[7] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

[8] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

recollection of either the telephone call or the meeting. His only comment contrary to claimant's position was that Mr. Kincaid would not have offered claimant a job without first talking to him. While his testimony does, somewhat, muddy the waters, it is not sufficiently strong to outweigh claimant's specific description of the job offer during the telephone call. This Board Member finds that claimant was in her home in Kansas when the job offer from Mr. Kincaid was accepted. Therefore, the Kansas Division has jurisdiction of this matter. The ruling by the ALJ on this issue is affirmed.

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[9]

Claimant first contends that the ALJ's finding that the Stipulation For Compromise Settlement, filed with the workers compensation division in Missouri at the time of claimant's settlement of her Missouri claim, constitutes written claim for a Kansas workers compensation claim and should be affirmed. In the alternative, claimant also alleges that medical reports from Dr. Amundson would constitute written claim, citing the Board's earlier decision in *Camp.*[10] It is acknowledged that a written claim need not take any particular form, so long as it is, in fact, a claim.[11] The court must look at the intention of the parties to determine what was in their minds in preparing and receiving the document. "The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?"[12] Here, the ALJ found the Stipulation For Compromise Settlement filed with the Missouri Division was timely written claim for a Kansas claim. However, there are problems associated with this finding. First, the Stipulation For Compromise Settlement is for a Missouri claim. Second, the Stipulation For Compromise Settlement settles fully, and for all time, the Missouri workers compensation claim. It is difficult to accept a final settlement, which allows for no future benefits, being a proper method of notifying respondent of claimant's intent to request future benefits in Kansas. There does not appear to be any intent on claimant's part to do so. Additionally, when claimant was asked

---

[9] K.S.A. 44-520a(a).

[10] *Camp v. Bourbon County*, Nos. 1,001,697 & 1,044,337, 2010 WL 3093216 (Kan. WCAB July 30, 2010).

[11] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

[12] Id., citing *Richardson v. National Refining Co.*, 136 Kan. 724, 18 P.2d 131 (1933).

about the Stipulation For Compromise Settlement and any intention on her part to file a claim in Kansas, she testified that she was not intending to file a lawsuit in Kansas.[13]

Claimant cites *Camp* in support of her position that medical reports from Dr. Amundson constitute written claim herein. However, in *Camp*, the claimant presented medical reports from Dr. Douglas Charles Burton, a treating physician, which provided added restrictions to claimant Camp's ability to work. The medical reports were provided to the respondent by the claimant with the intention that the new restrictions would be followed. The claimant's intention in *Camp* was to request added accommodation as required in the medical report. There is no such indication here. The medical reports of Dr. Amundson appear to be provided to keep respondent apprised of claimant's condition and ongoing treatment. There is no indication that the office note of August 8, 2008, was even provided to respondent. Additionally, this record does not indicate that claimant was aware of the medical report of April 4, 2007.

K.S.A. 44-557 states:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
>
> (b) When such accident has been reported and subsequently such person has died, a supplemental report shall be filed with the director within 28 days after receipt of knowledge of such death, stating such fact and any other facts in connection with such death or as to the dependents of such deceased employee which the director may require. Such report or reports shall not be used nor considered as evidence before the director, any administrative law judge, the board or in any court in this state.
>
> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the

[13] Owen Depo. at 32.

> last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.
>
> (d) The repeated failure of any employer to file or cause to be filed any report required by this section shall be subject to a civil penalty for each violation of not to exceed $250.
>
> (e) Any civil penalty imposed by this section shall be recovered, by the assistant attorney general upon information received from the director, by issuing and serving upon such employer a summary order or statement of the charges with respect thereto and a hearing shall be conducted thereon in accordance with the provisions of the Kansas administrative procedure act, except that, at the discretion of the director, such civil penalties may be assessed as costs in a workers compensation proceeding by an administrative law judge upon a showing by the assistant attorney general that a required report was not filed which pertains to a claim pending before the administrative law judge.

This Board Member finds that neither the Stipulation For Compromise Settlement nor the medical records of Dr. Amundson display an intent on claimant's part to request workers compensation benefits. The first time an actual written claim, displaying an intent to claim workers compensation benefits for a Kansas claim, was received by respondent was in April 2010, when respondent received the claim letter from claimant. This is not only beyond the 200-day limitation set forth in K.S.A. 44-520a; it is also beyond the one-year limit set out in K.S.A. 44-557.

The requirements of K.S.A. 44-520a have not been satisfied. The finding by the ALJ that claimant provided timely written claim in this matter is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that her contract of employment was created while she was in her home in Kansas City, Kansas, with the last act necessary to finalize the contract being her acceptance of the job offer. The finding by the ALJ that claimant's claim is subject to the jurisdiction of the Kansas Workers Compensation Act is affirmed. The finding that claimant filed timely written claim pursuant to K.S.A. 44-520a is reversed. The award of benefits in this matter is also reversed.

---

[14] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 21, 2011, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of June, 2011.

HONORABLE GARY M. KORTE

c: Kristi L. Pittman, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge